No. 49088-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHARLES C. JOHNSON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 15-1-00589-8

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Because the arresting officer knew that BPA did not authorize use of its property, and because the property was not "unimproved or apparently unused" as described in RCW 9A.52.010(2), a no-trespassing sign was not required in order to prohibit Johnson's entry onto the property, and the arresting officer, therefore, had probable cause to arrest Johnson for trespassing when the officer witnessed Johnson walking within the boundaries of the property.

B. FACTS AND STATEMENT OF THE CASE

On December 25, 2015, Officer Auderer of the Shelton Police Department witnessed Charles Johnson walking within the boundaries of property owned by the Bonneville Power Administration (BPA). RP 7-12. Officer Auderer was aware that BPA did not authorize entry onto its land and that BPA had specifically asked that the Shelton Police Department enforce trespass laws on the property. RP 9-10.

Officer Auderer contacted Johnson and ultimately arrested him for criminal trespassing in the second degree. RP 37. In a search incident to the arrest, Officer Auderer seized methamphetamine from Johnson's pocket. RP 37.

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Relevant to the instant appeal, the State charged Johnson with possession of a controlled substance. CP 68-70. (The State also charged Johnson with two counts of bail jumping, but those charges are not at issue in the instant appeal). CP 68-70. Johnson filed a motion to suppress the methamphetamine, based on his assertion that the arresting officer lacked probable cause to arrest him for trespassing and that the search incident to arrest was, therefore, unlawful. CP 83-85.

Following a hearing on Johnson's motion, the trial court entered findings of fact and conclusions of law denying Johnson's motion. RP 1-58; RP 112-15. The matter proceeded to jury trial, and the jury returned guilty verdicts. CP 32-34. Johnson now appeals the trial court's denial of his suppression motion. Br. of Appellant.

C. ARGUMENT

1. Standard of review when reviewing an order on a suppression motion.

When reviewing an order on a suppression motion, the reviewing court determines whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth

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of the stated premise. *Id.* The reviewing court treats unchallenged findings of fact as verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). The trial court's conclusions of law are reviewed de novo on appeal. *Garvin*, 166 Wn.2d at 249.

2. Because the arresting officer knew that BPA did not authorize use of its property, and because the property was not "unimproved or apparently unused" as described in RCW 9A.52.010(2), a no-trespassing sign was required in order to prohibit Johnson's entry onto the property, and the arresting officer, therefore, had probable cause to arrest Johnson for trespassing when the officer witnessed Johnson walking within the boundaries of the property.

Johnson appeals the trial court's pretrial ruling (CP 112-15) denying his motion to suppress the evidence that was seized incident to his arrest for trespassing in the instant case. Br. of Appellant at 7-14. Johnson contends that his arrest was unlawful because, he contends, although there were no-trespassing signs near where he was walking on BPA land, the signs were not "clearly visible" and "were less than informative as to what was prohibited." Br. of Appellant at 10. Thus, Johnson contends that there was insufficient probable cause for his arrest for trespassing and that, accordingly, evidence seized from him incident to the arrest should have been suppressed. Br. of Appellant at 12-14.

"A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080(1). However, the phrase "enters or remains unlawfully" is qualified, as follows:

> A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him or her by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner.

RCW 9A.52.010(2).

A law enforcement officer has probable cause to arrest if "'the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.'" *State v. Barron*, 170 Wn. App. 742, 750, 285 P.3d 231 (2012) (*quoting State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)). Whether probable cause exists depends on the totality of the facts and circumstances within the arresting officer's knowledge at the time of the arrest. *Barron* at 750. For a misdemeanor, an officer may arrest a

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person without a warrant if they have reason to believe that he or she has committed a misdemeanor in the officer's presence. RCW 10.31.100.

Here, Officer Auderer saw Johnson walking between a fenced power station and an electrical tower on BPA property at just before 10:00 p.m. RP 10-12, 21-22; Ex 2. Officer Auderer was aware that BPA did not permit use of their property and that they had requested that trespassing laws be enforced on their property. RP 9-10. The State contends that these facts and circumstances were sufficient to warrant a person of reasonable caution to believe that Johnson was trespassing on BPA land.

Here, the BPA land where Johnson was walking was not "unimproved *and* apparently unused land" (emphasis added) as the term appears in RCW 9A.52.010(2). The land is improved with the erection of numerous structures. Ex. 7. Additionally, the land has been cleared and improved with internal fencing and a utility path. Ex. 2-10. In addition to the obvious improvements to the property, it is also obvious that the land was not "apparently unused" as described in the qualifying language of RCW 9A.52.010(2). Therefore, neither fencing nor no-trespassing signs were necessary in this case to prove the crime of trespassing in the second degree. RCW 9A.52.010(2); RCW 9A.52.080(1).

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Nevertheless, in its ruling on Johnson's suppression motion, the trial court found that Johnson was "standing between two clearly visible no trespassing signs on an improved gravel road...." CP 112 (Finding of Fact No. 2). For the reasons argued above, the State contends that the trial court's finding regarding the no-trespassing signs was unnecessary to its ultimate denial of Johnson's suppression motion. Nevertheless, there is substantial evidence in the record to support the trial court's finding. RP 12; Ex. 4, 5, 6, 8, 9, 10.

It follows that, contrary to Johnson's assignments of error labeled C, D, E, and F, the trial court's conclusions of law numbers 2, 3, and 4, and the trial court's denial of Johnson's suppression motion, were not erroneous. As argued above, Officer Auderer witnessed the commission of the crime of trespass in the second degree in violation of RCW 9A.52.080(1), and an arrest was authorized by RCW 10.31.100. The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution both prohibit warrantless searches unless an exception to the warrant requirement applies. *State v. Rooney*, 190 Wn. App. 653, 658, 360 P.3d 913 (2015), *review denied*, 185 Wn.2d 1032 (2016). A search incident to arrest is an exception to the warrant requirement. *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015).

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Here, as argued above, Officer Auderer lawfully arrested Johnson for the crime of trespassing committed in the officer's presence; thus, the search incident to arrest was lawful. Incident to the arrest, Officer Auderer seized methamphetamine from Johnson's pocket. RP 37. If follows that the seizure of the methamphetamine was lawful, and the trial court did not err by denying Johnson's suppression motion.

3. The State is not seeking appellate costs in this case.

Regardless whether the State is, or is not, the substantially prevailing party in this case. the State is nevertheless not seeking appellate costs in this case.

D. CONCLUSION

For the reasons argued above, the State asks that this Court deny Johnson's appeal and sustain his conviction, and the State respectfully submits that Johnson's challenge of appeal costs is moot because the State is not seeking appeal costs in this case.

DATED: February 3, 2017.

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